rules governing bargaining in 1996, it recognized that the good faith obligation was central to the framework created by Congress in the 1996 Act, because good faith negotiating was necessary to address the significant disparities in bargaining power between incumbent LECs and competitive LECs.[64]

In the absence of an obligation to negotiate in good faith, competitive LECs, including Cox, are likely to have great difficulty in obtaining interconnection in a reasonable and timely fashion. At a minimum, the good faith obligation prevents a carrier like Qwest from refusing to enter into negotiations at all, or from refusing to negotiate specific issues of importance to a competitive LEC. The simple ability to get Qwest to the bargaining table increases the chance that a competitive LEC may be able to avoid arbitration, and the high costs and delays that go with it. On the other hand, in the absence of an obligation to bargain in good faith, it is likely that more negotiations will go to arbitration, increasing the barriers to entry for competitive LECs and the burdens on regulators in Iowa and Nebraska.

While Qwest includes this provision in its request for forbearance from Section 251(c), it provides no explanation at all of how forbearance from this requirement could be justified.[65] To the extent Qwest's theory is that its retail market share is a proxy for its ability to discriminate against other carriers in interconnection negotiations, this is incorrect, as Qwest remains the one indispensable party to which all other carriers must interconnect in both Iowa and Nebraska.[66] In

[64] Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15570 (1996). The Commission also imposed obligations on CLECs in the bargaining process.

[65] Petition at 22 (requesting forbearance from all of Section 251(c)).

[66] Indeed, it is difficult to imagine how the obligation to bargain in good faith could be subject to forbearance in the Omaha MSA alone, as it would not seem possible to meet the obligation as to one part of the states of Iowa and Nebraska without meeting it as to the rest of these states.

any event, in the absence of any affirmative showing in support of forbearance from this provision, the Commission must deny the request.

2. The Obligation to Interconnect at any Point.

Interconnection is central to local telephone competition and to the structure of the 1996 Act. Without interconnection, any new entrant would be unable to compete at all, since the vast majority of customers need the ability to reach all other telephone subscribers. Consequently, a request for forbearance from critical interconnection obligations bears a heavy burden, which Qwest cannot hope to meet. Qwest remains the only essential interconnecting party in the Omaha MSA, the only ubiquitous carrier in the market and the only one that connects to all other carriers. If Qwest were not obligated to provide interconnection at any technically feasible point at cost-based rates, as Section 251(c)(2) currently requires, it is certain that competition, and consumers, would suffer.

As a threshold matter, it is important to understand that there are no ubiquitous competitors in the Omaha market. The only ubiquitous provider is Qwest; even Cox provides service in only eighteen of the twenty-four Qwest-identified rate centers in the MSA.[67] Moreover, there are no providers that offer interconnection services in competition with Qwest, so there is no company that could fill the gap for other carriers if Qwest were not required to meet the requirements of Section 251(c)(2). In the absence of the statutory limitations of Section 251(c)(2), Qwest would be able to exercise power over interconnection, to the detriment of competition.

[67] Even in those rate centers, Cox does not serve all locations. As described above, Qwest has described the rate centers in Nebraska incorrectly. To avoid confusion, Cox used the rate centers listed by Qwest in the calculation above.

The effects of permitting Qwest to avoid its current interconnection obligations would be significant, and almost certainly would reduce consumer welfare in the Omaha market. Section 251(a) interconnection does not provide the same protections that Section 251(c)(2) offers against Qwest's market power as the sole ubiquitous interconnector. In particular, new carriers would face significant barriers to entry because Qwest no longer would be required to interconnect with them directly, or at points of their choosing or at cost-based rates. Section 251(a) provides simply that carriers must interconnect with each other "directly or indirectly." New entrants thus would be required to accept whatever terms Qwest proposed (assuming that Qwest was willing to offer them direct interconnection at all) or to try to obtain indirect interconnection through third parties, even though that service is not available in the Omaha MSA today.

New providers would not be the only ones affected. Existing carriers, including Cox, also would be subject to Qwest's whims. While it is possible that Qwest would maintain its current direct interconnection arrangements, there is no reason to believe that Qwest would not choose to seek more advantageous arrangements, that is, arrangements that cost Qwest less and cost the competitive LECs more, regardless of whether those costs are justified.[68] Given Qwest's superior bargaining position as the only ubiquitous carrier in the Omaha MSA, it would have an advantage in every negotiation, and likely would be able to shift its costs to the interconnecting competitive LECs.

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[68] For example, Qwest could demand that competitive LECs interconnect at every Qwest switch, which would be inexpensive for Qwest but very expensive for the interconnecting CLEC. This approach has been rejected by the Commission in the *Virginia Arbitration Order* as contrary to the requirement for interconnection at any point, but would be available to Qwest if forbearance were granted.

Existing carriers also would be affected because Qwest would be relieved from its obligation to carry transit traffic at reasonable rates. competitive LECs would be forced either to pay whatever rate Qwest wishes to charge for transit service or to establish direct interconnection with other carriers. This is a significant issue for all competitive LECs.

For instance, Cox has worked consistently to negotiate and enter into interconnection agreements with other carriers whenever it is reasonable and appropriate to do so, and to establish direct trunking arrangements when traffic exchanged with other carriers reaches a reasonable level. Nevertheless, Cox has found that it can justify direct interconnection with only ten carriers other than Qwest in the Omaha MSA. For more than half the carriers to which Cox sends traffic, call volumes are simply too low to warrant direct interconnection and the same is true for carriers that send traffic to Cox. From both the economic and engineering points of view, it would make no sense to enter into direct interconnection arrangements with more of these companies, so Cox is forced to rely on transiting arrangements through Qwest.

Because there is no substitute for Qwest's transiting service, if Qwest were relieved of its Section 251(c)(2) obligation to provide transit service, the only effect would be to increase other carriers' costs with no benefits in network efficiency and with significant detriments to consumers. Qwest would have significant incentives to raise its transit rates to reflect its unique status, and carriers either would be forced to construct economically inefficient direct interconnection facilities or pay Qwest's increased rates. In either case, the result would be higher costs for competitors and, necessarily, higher rates for consumers. Moreover, Qwest already is compensated for transit service, at rates that have been approved by the relevant state commissions under rules approved by the Supreme Court. Any increases would simply reflect anticompetitive rents and, consequently, increased burdens on consumers. Thus, the public interest would not be served by forbearance from the statutory requirements of Section 251(c)(2).

3. The Obligation to Provide Unbundled Elements.

Cox does not use many unbundled elements, but the ones it does use are significant to its business. In the Omaha MSA, Cox has a need for access to standard loops to serve business customers in locations off Cox's network.[69] The Petition, by asking the Commission generally to relieve Qwest of its unbundling obligations, implicitly asks the Commission to eliminate the obligation to provide loops and subloops. The Petition, however, provides no reason to overturn the Commission's recent national finding that competitive LECs are impaired without access to these facilities.

Qwest is asking the Commission to overturn a very recent decision that affirmed the requirement that incumbent LECs provide access to basic loops and subloops. This finding not only is just one year old, but was essentially unopposed by incumbent LECs, including Qwest.[70] Qwest provides no evidence to overcome this finding. While the Petition discusses the availability of switching from other vendors, it says nothing at all about the current availability of loops. In the absence of any showing by Qwest, the Commission's impairment findings are the only basis for a determination, and require the Commission to deny forbearance as to loops and subloops.

[69] Cox's facilities are concentrated in residential areas and it has relatively few facilities in business centers.

[70] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* 18 FCC Rcd 16978, 17128, 17190-91 (2003). In fact, no incumbent LEC opposed the Commission's determination that standard residential loops and low-capacity business loops should remain subject to unbundling, and it was not one of the issues in the appeal of the decision.

4. The Obligation to Provide Collocation.

Collocation and interconnection are closely related obligations and, consequently, analysis of Qwest's collocation obligation is similar to the analysis of the interconnection obligation. Collocation is critical for competitive LECs because it provides a mechanism for secure interconnection. Like interconnection, there is no effective substitute for collocation at Qwest's switches; indeed, it is not possible for any other vendor to provide a service equivalent to collocation.

Moreover, collocation is the only way for carriers to use only their own facilities to interconnect with Qwest. The ability to make economically rational decisions about how to connect to Qwest is important to all carriers, including those that are facilities-based.

At the same time, there is no evidence that collocation is burdensome to Qwest. Qwest is fully reimbursed for any costs it incurs for collocation by the competitive LECs that collocate. Cox, for instance, pays the entire cost of collocation, with no contribution from Qwest, even when Qwest sends its outbound traffic to Cox via a collocation arrangement. At the same time, the Commission's collocation rules ensure that Qwest can use its facilities for its own purposes when it needs to do so, by permitting it to reserve space and take other actions necessary to operate its business.[71] Thus, collocation does not impose unreasonable burdens on Qwest. When the lack of burdens is balanced against the importance of collocation to local competition, there plainly is no basis for forbearance.

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[71] 47 C.F.R. § 51.323.

5. The Obligation to Provide Notification of Network Changes.

Under Section 251(c)(5), incumbent LECs are required to provide reasonable notice of changes to their networks.[72] These notices are essential to the efficient exchange of traffic between Qwest and other carriers, and they greatly reduce the likelihood that carriers will be unable to exchange traffic because of technical incompatibilities.[73] Even if network change notifications were not required by statute, they would be necessary to ensure smooth functioning of the public switched telephone network in a multi-carrier environment. Providing notice in accordance with the Commission's rules is not burdensome, and is easily integrated into the carrier's existing processes.

In the Petition, Qwest provides no evidence that there is any reason to forbear from this requirement. It makes no attempt to show that network notification is burdensome or unnecessary for competition. Moreover, this obligation is particularly disconnected from the generic market-share allegations that Qwest makes throughout the Petition, as the effects of network changes on other carriers have nothing to do with their market shares. Indeed, given Qwest's position as the ubiquitous interconnecting carrier, changes in Qwest's network are significant to competition regardless of Qwest's retail market share, and consequently a market share showing is irrelevant to forbearance from this requirement.

6. Qwest Has Not Demonstrated that It Has Fully Implemented Sections 251 and 271.

As described above, Section 10(d) requires a showing that Qwest has fully implemented Sections 251 and 271 before forbearance can be provided as to either of those sections. Qwest attempts to provide this showing by analogy, claiming that grant of its Section 271 application in

[72] 47 U.S.C. § 251(c)(5).

[73] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Second Report and Order*, 11 FCC Rcd 19392, 19471 (1996).

Iowa and Nebraska demonstrates that it has met this standard, but this theory is inconsistent with the existing case law. Consequently, the Commission must demand more evidence of full implementation than Qwest has provided.

In the context of this application, however, the Commission need not define the complete breadth of the full implementation requirement. It is enough to note that Qwest has not made any showing, and that Qwest also failed to meet its obligation as an incumbent LEC to file interconnection agreements with state commissions.[74] By themselves, either of these facts would be sufficient to justify denial of the Petition.

B. Forbearance Would Create an Intolerable Risk of Anticompetitive Behavior by Qwest.

The forbearance Qwest seeks would significantly impair the ability of the Commission and state regulators to monitor Qwest's behavior and discipline it for anticompetitive activity, particularly in the areas of interconnection, collocation and network unbundling. One of the underlying presumptions of the 1996 Act is a principle that the Commission has recognized many times: in the absence of regulatory oversight, incumbent LECs have the ability and the incentive to leverage their market and network power in anticompetitive ways.[75] Given the great extent to which Qwest's competitors must continue to rely on Qwest's network for their ability

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[74] Qwest Corporation, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 5169 (2004) ("*Qwest NAL*").

[75] *See, e.g.*, GTE Corporation and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, 14120-22 (2000); Implementation of the Telecommunications Act of 1996, *Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273*, 14 FCC Rcd 15550, 15626-27 (1999); Petition of U S WEST Communications, *Memorandum Opinion and Order*, 14 FCC Rcd 16252, 16273-77 (1999); Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14867 (1999).

to provide local service in the Omaha MSA, it would be unwise for the Commission to surrender its ability to ensure that Qwest's interconnection, collocation and unbundling practices continue to foster competition. Qwest's obvious incentives to undermine competition, the power it wields through its network, and its troublesome history of noncompliance with interconnection-related and other competitive safeguards all counsel strongly against a Commission decision to forego any enforcement authority it currently holds over Qwest.

Qwest's capacity for anticompetitive behavior is well-documented. Indeed, Qwest is seeking forbearance less than six months after the Commission proposed a record $9 million fine for Qwest's failure to disclose its voluntarily negotiated interconnection agreements to the Arizona and Minnesota state commissions.[76] The Commission recognized the importance of Section 252's reporting requirement to vigorous local competition and the flagrance of Qwest's refusal to follow the law even after it told the Commission that all agreements would be filed.[77] In that case the Commission highlighted how Qwest's actions in Arizona and Minnesota were motivated by its desire to manipulate the Section 271 approval process and not by any attempt to compete fairly or even adhere to a good-faith interpretation of the Commission's rules.[78] Given Qwest's lack of candor and willingness to abuse the Commission's processes in the Section 271 context, the Commission has no choice but to recognize that if forbearance is granted, there is a significant danger that Qwest will conduct its relationships with competitive LECs in Omaha in precisely the same manner, with potentially disastrous results for competition.

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[76] *Qwest NAL*, *supra* n.74.

[77] *Id.* at 5184, 5187, 5188.

[78] *Id.* at 5172, 5182.

Moreover, Qwest's misconduct in Minnesota and Arizona shows that it is not deterred by the Communications Act's prohibitions on discriminatory treatment of competitive LECs.[79] Both the Minnesota and Arizona commissions found that Qwest had discriminated against competitive LECs in failing to file its interconnection agreements, which shows that Qwest has not been deterred from noncompliance with interconnection regulations by potential complaints under Sections 201 and 202 of the Act – provisions that Qwest now says would provide sufficient protection if the Commission grants forbearance.[80] It would be irresponsible for the Commission to grant Qwest the relief it seeks under the assumption that competitive LECs in Omaha would continue to be protected by the statutory nondiscrimination provisions that have failed in the past to alter Qwest's behavior.

Nor is the recent forfeiture the first example of Qwest's reckless disregard of the Commission's fair competition rules. In 2002, the Commission entered into a consent decree to settle complaints that Qwest had failed to update its website with information regarding locations that had exhausted their available collocation space.[81] By failing to give the notice required by the Commission's rules, Qwest ensured that competitive LECs needlessly would expend resources requesting collocation at Qwest locations where no space was available.

Qwest is not unique among incumbent LECs in its failure to adhere consistently to the fair competition provisions of the Communications Act and the Commission's rules. In just the past two years, SBC Communications, Inc. has been required to pay more than $10 million in fines and settlements for anticompetitive conduct ranging from failure to provide competitors

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[79] 47 U.S.C. §§ 201, 202.

[80] *Qwest NAL*, 19 FCC Rcd at 5192 (the Commission did not address the question of whether Qwest's conduct was unlawfully discriminatory under Section 202); Qwest Petition at 33.

[81] Qwest Communications International, Inc., *Order*, 17 FCC Rcd 14245 (2002).

with shared transport under conditions imposed by the Commission, to refusing to provide verified responses to inquiries about discrimination in the provisioning of DSL services, to failing to update public information regarding available collocation space, to premature entry into the interLATA toll market in several of its states.[82] Similarly, BellSouth has been required to make payments of $2 million for a range of violations, including failure to adhere to the Commission's affiliate separation requirements, failure to negotiate interconnection agreements in good faith, failure to honor competitive LEC local exchange service requests and unauthorized entry into the long distance market in several of its states.[83] This is just a small sampling of incumbent LEC behavior that constitutes sanctionable conduct.[84] The consistent failure of Qwest and other incumbent LECs to live up to existing regulations does not warrant a relaxation of those regulations, but rather continued vigilance and enforcement to protect emerging competition.

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[82] SBC Communications, Inc., *Forfeiture Order*, 17 FCC Rcd 19928 (2002) ($6.3 million fine for violation of merger conditions); SBC Communications, Inc., *Forfeiture Order*, 17 FCC Rcd 7589 (2002) ($100,000 forfeiture for failure to cooperate with investigation into DSL provisioning practices); SBC Communications, Inc., *Order*, 18 FCC Rcd 19880 (2003) ($3.6 million consent decree for making false statements in a Section 271 proceeding and premature entry into the market for interLATA toll service in several states); SBC Communications, Inc., *Order on Review*, 17 FCC Rcd 4043 (2002) ($84,000 fine for failure to update publicly available information regarding available collocation space).

[83] BellSouth Telecommunications, Inc, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 5310 (2004) ($75,000 fine proposed for failure to maintain required separation between BellSouth and Section 272 affiliate); BellSouth Corporation, *Consent Decree*, 15 FCC Rcd 21756 (2000) ($750,000 paid in settlement of allegations that BellSouth failed to negotiate an interconnection in good faith); BellSouth Corporation, *Consent Decree*, 18 FCC Rcd 15135 (2003) ($1.4 settlement of charges that BellSouth had prematurely entered the market for interLATA toll service in several of its markets and that it has failed to honor CLEC local exchange service requests).

[84] *See, e.g.*, *Verizon* Telephone Companies, *Consent Decree*, 2004 FCC LEXIS 4154, FCC 04-180 (released July 27, 2004) ($300,000 consent decree settling allegations concerning Verizon's lack of compliance with structural, transactional, and nondiscrimination safeguards applicable to its affiliate relationships); Verizon Telephone Companies, *Consent Decree*, 18 FCC Rcd 3492 (2003) ($5.7 million fine for premature entry into interLATA toll market in several states).

These violations demonstrate that the incentives for incumbent LECs to compete unfairly are strong enough to induce misbehavior even under current levels of regulatory oversight. Those incentives will not diminish with the reduction of regulation, but the Commission's ability to detect violations and impose punishment will decline precipitously. If the Commission begins freeing incumbent LECs from interconnection and other incumbent carrier regulation based on generalized claims of market share decline, it only will make it easier for them to behave anticompetitively and make it more difficult for competitive LECs to enforce their rights.

Qwest also has the ability to leverage its monopolies in other regions and the scope of its 14-state local telephone business to impede competition. Qwest retains an effective local monopoly throughout much of Iowa and Nebraska, and retains the ability to cross-subsidize from those markets to Omaha. Qwest's size also increases its bargaining power against any competitive LEC. Even Cox, the largest wireline competitor in Omaha, is dwarfed by Qwest.

Equally important, local competition has not yet reached a point in Omaha or anywhere else where basic safeguards protecting interconnection, collocation and unbundled network elements safely can be removed. A world in which, for example, bad-faith interconnection negotiations no longer violate the Commission's rules is not a world in which competition, which depends on interconnection, can survive in Omaha or any other market. Similarly, competition cannot thrive in a world in which incumbent LECs are free to discriminate against competitors without fear of liability because competitive LECs' remaining remedies (*i.e.*, the Section 208 complaint process) are either too slow, too cumbersome, or too expensive to be used effectively. The provisions from which Qwest seeks forbearance are still too integral to competition, and the incentives for incumbent LECs to compete unfairly are too great, to risk granting the requested relief.

V. Any Forbearance from Dominant Carrier Regulation Must Account for Potential Effects Under the Competitive LEC Access Charge Rules.

Qwest has asked for relief from the Commission's dominant carrier regulations contained in Section 214 of the Act and Section 61.38, 61.41-.49 and 65 of the Commission's rules.[85] Essentially, Qwest seeks freedom from the Commission's dominant carrier tariffing requirements and its price cap/rate of return regulations.[86] Cox limits its comments on this issue to the potential impact of granting Qwest blanket relief from all tariffing obligations on the Commission's competitive LEC access charge regime if the Commission determines that Qwest should be treated as nondominant for those services.[87]

To the extent that that Commission grants Qwest the relief it seeks, it must adjust its competitive LEC access charge regulations for the Omaha market. Under current rules, competitive LECs must maintain their rates at or below the incumbent LEC's access rates.[88] To fulfill this obligation, competitive LECs must have adequate notice of what the incumbent LEC's access rates are.[89] If Qwest's Petition is granted, it will be impossible for competitors to be certain that they are in compliance with their obligations because Qwest would be permitted to alter its rates without meaningful notice. Even presuming that competitive LECs would be notified of an access rate change at the time the change is made, they still would be forced to

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[85] 47 U.S.C. § 214; 47 C.F.R. §§ 61.38, 61.41-49; 65.1 - 65.830.

[86] Petition at 31-32.

[87] Although Qwest does not specifically request that the Commission declare it nondominant as a provider of CLEC access services, that plainly is a large part of its request. Qwest is not classified as a dominant carrier for long distance services and determinations of nondominance in the area of local services are best reserved in the first instance for the state commissions that have the responsibility to regulate those services.

[88] 47 C.F.R. § 61.26.

[89] Cox opposes Qwest's request for relief from incumbent LEC regulation. *See infra* Part VI. Presuming that request is denied, Cox and other Omaha CLECs will continue to be required to tie their access rates to Qwest's.

adopt the new rate immediately to stay in compliance with the Commission's rules, without time to analyze or determine the reasonableness of the new charge.

Cox does not necessarily oppose granting Qwest relief from its current tariffing responsibilities. If the Commission grants this request, however, it must make provision in its rules for Omaha competitive LECs to comply with the Commission's competitive LEC access rate limitations. So long as competitive LEC access rates remain tied to incumbent LEC access rates, the Commission must give competitive LECs a reasonable opportunity to respond to incumbent LEC rate changes. Cox proposes that if the Commission grants nondominance to Qwest and the accompanying relief from its tariff responsibilities, it should permit competitive LECs in Omaha to maintain their access charge rates for a period of no less than 60 days after a Qwest rate change. This time period is necessary to give competitive LECs the opportunity to analyze Qwest's new rate, to determine whether it is reasonable, and to decide whether to adjust its own rate to conform to Qwest's rate or to challenge the new rate as unreasonable under Sections 201 and 208 of the Act.[90]

VI. Qwest Cannot Be Relieved of Its Incumbent LEC Status.

Qwest's final request is for the Commission to forbear from applying incumbent LEC status to the company. It is unclear whether Qwest believes it can obtain separate relief via a claim that it no longer merits incumbent LEC status or whether this request simply is intended to reinforce its earlier claims for regulatory relief. In either case, the Commission cannot grant the request because Qwest has not demonstrated that it meets the standards for forbearance.

As an initial matter, since Qwest does not meet the standards for forbearance from individual provisions of Sections 251(c) and 271, the Commission cannot permit it to obtain the

[90] 47 U.S.C. §§ 201, 208.

same relief through the back door mechanism of forbearance from incumbent LEC status. Forbearance from any requirement must be based on compliance with the specific requirements of Section 10, and Qwest's inability to meet those requirements ends the inquiry, regardless of its claims about market share and the success of its competitors.

Even if it were possible for Qwest to obtain forbearance from incumbent LEC status, Qwest clearly maintains the indicia of its initial incumbent LEC status. First, as shown above, Qwest still is the only ubiquitous carrier in the Omaha market, and the only carrier to interconnect directly with all competitive LECs, incumbent LECs, interexchange carriers and wireless carriers. This alone is sufficient to demonstrate that Qwest cannot be relieved of its incumbent LEC status.

Qwest's ubiquity as an interconnector, however, is not the only indication that Qwest retains its status as an incumbent LEC in the Omaha MSA. Notably, in both Nebraska and Iowa, Qwest continues to be the only carrier of last resort in the MSA. At the same time, Qwest is the central carrier for E911 service in the MSA, meaning that all E911 traffic from other competitive LECs is routed through Qwest. Until another carrier takes on these responsibilities, Qwest will remain the incumbent LEC in the Omaha MSA.

Finally, Qwest makes the claim that Cox should be treated as an incumbent LEC if Qwest maintains incumbent LEC status. This is absurd. As noted above, even if the Commission were to take this claim seriously, Qwest has not met the procedural requirements for a reclassification proceeding.[91] There is, however, no reason to give any credence to Qwest's argument because there is simply no evidence that Cox has achieved a position "comparable to another incumbent LEC."

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[91] *See supra* Section II(D).

The sum of Qwest's argument is that Cox has market share comparable to Qwest's in the Omaha MSA.[92] Even if it were true, that is not nearly enough. Qwest makes no demonstration that Cox has any of the indicia of incumbent LEC status. In particular, there is no showing that Cox has met the criteria used by the Commission in the *GTA NPRM.* First, Cox does not possess economies of density, connectivity and scale that make competitive entry difficult.[93] As shown above, Qwest is the only ubiquitous carrier in the MSA, and the only carrier that interconnects with all other carriers, and Qwest is the only carrier to provide E911 connectivity. Hence, it is Qwest – not Cox – that occupies that central role.

Second, Cox does not provide local exchange service to the entire Omaha MSA.[94] As described above, Cox does not provide service in six of the twenty-four Qwest-described wire centers in the MSA, while Qwest provides service in every Omaha wire center. Again, it is Qwest, not Cox, that meets this criterion.

Third, the *GTA NPRM* asked whether treating a carrier as an incumbent is likely to foster competitive entry.[95] Treating Cox as an incumbent LEC would have no effect at all on competitive entry, and might actually discourage other carriers from entering the market for fear that they might be subjected to incumbent LEC obligations. Qwest has made no showing that Cox has done anything to discourage or impede the entry of other carriers. Indeed, there is no basis to believe that Cox would or could do so, and Cox has not engaged in any of the behaviors

[92] As is the case for the Petition generally, Qwest does not provide any reason to believe that the Omaha MSA is the correct area to be considered in this analysis. Among other things, the MSA is split between two states, and Qwest has much greater market share in each of the states than it does in the specific territory Qwest has chosen. Unlike the *GTA Order,* where there was no question as to the correct geographic region, in this instance the choice of the region to be considered in an incumbent LEC analysis would be very difficult.

[93] *GTA NPRM,* 12 FCC Rcd 6941.

[94] *Id.*

[95] *Id.*, at 6947-48.

that are characteristic of incumbent LECs in the Omaha MSA. Applying incumbent LEC requirements to Qwest, on the other hand, clearly has fostered and will foster economically efficient competitive entry in the Omaha MSA. As shown throughout these comments, applying incumbent LEC requirements to Qwest is necessary to ensuring that consumers reap the benefits of competition.

VII. Conclusion

Qwest has not begun to meet the burdens of Section 10 and, consequently, has not justified forbearance from any provision of Section 251(c) or from its incumbent LEC status. The Commission should act swiftly to reject the Petition and to ensure that Qwest remains subject to its obligations under the Communications Act.

For all these reasons, Cox Communications, Inc. respectfully requests that the Commission adopt an order consistent with these comments.

Respectfully submitted,

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August 24, 2004

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 24th day of August, 2004, copies of the foregoing Comments of Cox Communications, Inc. were served by via hand delivery or first-class mail postage prepaid (denoted by *), to the following:

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